

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KATHRYN MARIE MORGAN,) No. SA CV16-00305 (AS)
)
Plaintiff,)
v.) **MEMORANDUM OPINION AND**
) **ORDER OF REMAND**
CAROLYN W. COLVIN,)
Acting Commissioner of Social)
Security,)
Defendant.)

Pursuant to Sentence 4 of 42 U.S.C. § 405(g), IT IS HEREBY
ORDERED that this matter is remanded for further administrative
action consistent with this Opinion.

I. PROCEEDINGS

On December 4, 2015, Plaintiff Kathryn Marie Morgan
("Plaintiff") filed a Complaint seeking review of the Commissioner's
denial of Plaintiff's application for a period of disability and

1 disability insurance benefits ("DIB"). (Docket Entry No 1). On
2 June 24, 2016, Defendant filed an Answer to the Complaint and the
3 Certified Administrative Record ("AR"). (Docket Entry Nos. 13, 14).
4 The parties have consented to proceed before a United States
5 Magistrate Judge. (Docket Entry Nos. 9, 10). The parties filed a
6 Joint Stipulation ("Joint Stip.") on August 31, 2016, setting forth
7 their respective positions on Plaintiff's claims. (Docket Entry No.
8 15).

9 10 **II. BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION**

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12 Plaintiff, formerly employed as a customer service clerk and
13 office manager (AR 28), asserts disability beginning June 1, 2009,
14 based on the alleged mental and physical impairments of fibromyalgia
15 and spinal impairments. (Joint Stip. 3). On April 17, 2012, an
16 Administrative Law Judge, Milan M. Dostal ("ALJ Dostal"), examined
17 the record and heard testimony from Plaintiff and a vocational
18 expert. (A.R. 123-43). On May 24, 2012, ALJ Dostal denied
19 Plaintiff benefits in a written decision. (AR 173-81). Plaintiff
20 sought review by the Appeals Council, and it vacated and remanded
21 ALJ Dostal's decision on August 12, 2013. (AR 186-90). A second
22 hearing was held before Administrative Law Judge Joseph P. Lisiecki
23 III ("ALJ") on January 16, 2014. (AR 144-67). On March 19, 2014,
24 the ALJ denied Plaintiff benefits in a written decision. (A.R. 15-
25 35). The Appeals Council denied Plaintiff's request to set aside the
26 ALJ's decision on December 22, 2015. (AR 1-6).

1 The ALJ applied the five-step process in evaluating Plaintiff's
2 case. (AR 19-30). At step one, the ALJ determined that Plaintiff
3 had not engaged in substantial gainful activity after the alleged
4 onset date. (AR 21). At step two, the ALJ found that Plaintiff has
5 the severe impairments of lumbar spine degenerative disc disease,
6 status post fusion and status post hardware removal, fibromyalgia,
7 and depression. (AR 21). At step three, the ALJ found that
8 Plaintiff's impairments did not meet or equal a listing found in 20
9 C.F.R. Part 404, Subpart P, Appendix 1. (AR 21-22).

10
11 Before proceeding to step four, the ALJ found that Plaintiff
12 had the residual functional capacity ("RFC")¹ to perform sedentary
13 work in that she can do "sedentary lifting," sit for 6 hours in an
14 8-hour workday, and stand and walk 2 hours total in an 8-hour
15 workday. (A.R. 24). In making this finding, the ALJ determined
16 that "in spite of" damage to Plaintiff's lumbar spine, Plaintiff
17 "continues to have full motor strength in the lower extremities,
18 intact sensation, generally normal range of motion, and generally
19 normal and equal reflexes," which would normally place plaintiff's
20 lifting capacity at a light range, but the ALJ reduced Plaintiff's
21 lifting capacity to sedentary limitations because of the pain
22 symptoms from Plaintiff's fibromyalgia. (AR 25). The ALJ then
23 determined that Plaintiff can sit for 6 hours in an 8-hour workday
24 because "of the lack of problems with [Plaintiff's] lower
25 extremities that would necessitate a lessened sitting capacity," and

26 ¹ A Residual Functional Capacity is what a claimant can still
27 do despite existing exertional and nonexertional limitations. See
28 20 C.F.R. §§ 404.1545(a)(1), 416.945(a)(1).

1 found that Plaintiff is able to engage in limited postural
2 movements, such as stooping, bending, and kneeling, and precluded
3 from climbing ladders, ropes, and scaffold because of "her lumbar
4 spine impairment." (Id.).

5
6 In making this finding, the ALJ considered the opinions of
7 state-agency medical consultants Kenneth Glass, M.D. and H. Han,
8 M.D. (AR 26). Both consultants found that Plaintiff could sit for
9 6 hours in an 8-hour workday and occasionally engage in kneeling,
10 bending, and stooping. (AR 452-58, 516-17). The ALJ agreed with
11 these assessments and incorporated these limitations in the RFC
12 determination. (See AR 25-26). The consultants also found that
13 Plaintiff could lift and carry 20 pounds occasionally and 10 pounds
14 frequently and stand and walk for 4 hours in an 8-hour workday. (AR
15 452-58, 516-17). The ALJ gave "less weight" to these assessments,
16 finding that the consultants did not "sufficiently account for
17 [Plaintiff's] fibromyalgia syndrome symptoms." (Id.).

18
19 The ALJ rejected favorable opinion evidence from Plaintiff's
20 treating physician, Dr. Zepeda. (AR 26-27). Dr. Zepeda filled out
21 functional capacity questionnaires in February 2011, October 2011,
22 and December 2013 regarding Plaintiff's physical limitations. (AR
23 387, 531-35, 712-17). Dr. Zepeda limited Plaintiff to 2-3 hours of
24 sitting in an 8-hour workday; 1-2 hours of standing and walking in
25 an 8-hour workday; lifting and carrying less than 10 pounds
26 occasionally; precluded Plaintiff from kneeling, bending, and
27 stooping (AR 387, 532, 715), and surmised that Plaintiff would miss
28

1 three or more days of work per month because of her impairments.
2 (AR 535, 716). The ALJ implicitly rejected Dr. Zepeda's opinion on
3 Plaintiff's sitting and posterior limitations in favor of the
4 assessments of Dr. Glass and Dr. Han. (See AR 25-27).
5

6 The ALJ justified giving "little weight to all of [Dr.
7 Zepeda's] opinions" finding that they were partially based on the
8 "unsubstantiated" diagnoses of chronic pain syndrome and lumbar
9 canal stenosis. (AR 27). The ALJ rejected Dr. Zepeda's chronic
10 pain syndrome diagnosis because he found no objective records
11 supporting the diagnosis. (AR 28). The ALJ also rejected lumbar
12 canal stenosis as a diagnosis because Plaintiff's most recent
13 magnetic resonance scan ("MRI") did not mention canal stenosis,
14 despite Dr. Zepeda's much reported diagnosis of canal syndrome. (AR
15 28). Thus, the ALJ determined that Dr. Zepeda's diagnoses "were not
16 supported by the full medical evidence of record as they are
17 primarily based on [Plaintiff's] subjective complaints." (Id.).
18

19 The only other medical opinion evidence assigned weight by the
20 ALJ was the hearing testimony given by Dr. Eric Schmitter, an
21 orthopedic surgeon. (AR 26). The ALJ gave the assessment "less
22 weight," finding that Dr. Schmitter could not account for the
23 effects of fibromyalgia because it was "outside his area of
24 specialty as an orthopedist." (Id.).
25

26 At step four, the ALJ determined that Plaintiff was not able
27 to perform her past relevant work. (AR 28-29). At step five, the
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1 ALJ found Plaintiff was able to perform jobs consistent with her
2 age, education, and medical limitations existing in significant
3 numbers in the national economy. (AR 29-30). In particular,
4 Plaintiff could perform the requirements of an assembler (Dictionary
5 of Occupational Titles ("DOT") No. 734.687-018) and table worker,
6 visual inspection (DOT 739.687-182). (AR 29-30). Thus, the ALJ
7 found that Plaintiff was not disabled. (AR 30).

8
9 Plaintiff requested that the Appeals Council review the ALJ's
10 decision. (AR 1). The request was denied on December 22, 2015.
11 (AR 1-5). The ALJ's decision then became the final decision of the
12 Commissioner, allowing this Court to review the decision. See 42
13 U.S.C. §§ 405(g), 1383(c).

14 15 III. STANDARD OF REVIEW

16
17 This court reviews the Administration's decision to determine
18 if the decision is free of legal error and supported by substantial
19 evidence. See Brewes v. Commissioner of Social Sec. Admin., 682
20 F.3d 1157, 1161 (9th Cir. 2012). "Substantial evidence" is more
21 than a mere scintilla, but less than a preponderance. Garrison v.
22 Colvin, 759 F.3d 995, 1009 (9th Cir. 2014). To determine whether
23 substantial evidence supports a finding, "a court must consider the
24 record as a whole, weighing both evidence that supports and evidence
25 that detracts from the [Commissioner's] conclusion." Aukland v.
26 Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001). As a result, "[i]f
27 the evidence can reasonably support either affirming or reversing
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1 the ALJ's conclusion, [a court] may not substitute [its] judgment
2 for that of the ALJ." Robbins v. Soc. Sec. Admin., 466 F.3d 880,
3 882 (9th Cir. 2006).

4 5 IV. PLAINTIFF'S CONTENTIONS

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7 Plaintiff contends that the ALJ (1) failed to properly consider
8 the medical evidence contained in the opinions of her treating pain
9 management physician in assessing her residual functional capacity;
10 and (2) committed harmful error in finding Plaintiff's subjective
11 complaints not credible. (Joint Stip. 5-15, 22-25).

12 13 V. DISCUSSION

14
15 After reviewing the record, the Court finds that the ALJ's RFC
16 determination failed to properly account for the combined effects of
17 all of Plaintiff's impairments and consider Dr. Zepeda's opinion and
18 related diagnoses of chronic pain syndrome and lumbar canal
19 stenosis. The Court therefore remands for further consideration.

20 21 A. The ALJ Erred In Failing To Assess The Opinion Of 22 Plaintiff's Treating Physician In Determining Plaintiff's 23 RFC.

24
25 Although a treating physician's opinion is generally afforded
26 the greatest weight in disability cases, it is not binding on an ALJ
27 with respect to the existence of an impairment or the ultimate
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determination of disability. Batson v. Comm'r of Soc. Sec. Admin., 359 F.3d 1190, 1195 (9th Cir. 2004); Magallanes v. Bowen, 812 F.2d 747, 751 (9th Cir. 1989). The weight given to a treating physician's opinion depends on whether it is supported by sufficient medical data and is consistent with other evidence in the record. 20 C.F.R. § 416.927(b)-(d); Social Security Ruling ("SSR") 96-2p. To reject the uncontradicted opinion of a treating physician, the ALJ must give "clear and convincing reasons that are supported by substantial evidence." Ghanim v. Colvin, 763 F.3d 1154, 1160-61 (9th Cir. 2014) (quoting Bayliss v. Barnhart, 427 F.3d 1211, 1216 (9th Cir. 2005)). If the treating doctor's opinion is contradicted by another doctor, the ALJ must provide "specific and legitimate reasons" for rejecting the treating physician's opinion. Orn v. Astrue, 495 F.3d 625, 632 (9th Cir. 2007); Reddick v. Chater, 157 F.3d 715, 725 (9th Cir. 1998).

Plaintiff asserts that the ALJ did not provide clear and convincing reasons² for rejecting the opinion of Dr. Zepeda, Plaintiff's pain management physician, regarding his diagnosis of lumbar canal stenosis and chronic pain syndrome. (Joint Stip. 5-15). Specifically, Plaintiff contends that the ALJ improperly concluded that there is no objective finding of lumbar stenosis,

² Plaintiff argues that Dr. Zepeda's opinion was uncontradicted by other physicians' opinions, but, as discussed in Part V.A infra, Dr. Zepeda's opinion was contradicted by two non-examining medical consultants, which alters the standard of review to "specific and legitimate," rather than "clear and convincing" reasons. Compare Ghanim, 763 F.3d at 1160-61; with Orn, 495 F.3d at 632.

1 despite a 2009 MRI and x-rays showing lumbar canal stenosis and a
2 2012 MRI showing lumbar foraminal stenosis. Further, the ALJ made an
3 "unsubstantiated presumption" in finding "a meaningful distinction
4 between the symptoms and limitations that would flow from neural
5 foraminal stenosis versus canal stenosis." (Joint Stip. 12).

6
7 Defendant argues that the ALJ properly rejected the opinion of
8 Dr. Zepeda because Plaintiff's treatment records were based entirely
9 on Plaintiff's subjective complaints and also contradicted the
10 functional limitations assessed by Dr. Zepeda. (Joint Stip. 20).

11
12 In rejecting Dr. Zepeda's opinions, the ALJ implicitly relied
13 on the opinions of Dr. Glass and Dr. Han, non-examining medical
14 consultants. "The opinion of a non-examining medical advisor cannot
15 by itself constitute substantial evidence that justifies the
16 rejection of the opinion of an examining or treating physician." See
17 Lester, 81 F.3d 821 (9th Cir. 1995); Pitzer v. Sullivan, 908 F.2d
18 502, 506 n. 4 (9th Cir. 1990); Gallant v. Heckler, 753 F.2d 1450,
19 1456 (9th Cir. 1984). An ALJ must still provide specific and
20 legitimate reasons, in addition to the contradicting opinion of a
21 non-examining medical professional, in order to support his
22 rejection of a treating physician's opinion. See, e.g., Morgan v.
23 Comm'r of Soc. Sec. Admin., 169 F.3d 595, 602-03 (9th Cir. 1999)
24 (citing Magallanes, 881 F.2d at 751-55); Andrews, 53 F.3d 1035, 1043
25 (9th Cir. 1995); Roberts v. Shalala, 66 F.3d 179 (9th Cir. 1995).

1 Here, the ALJ rejected the chronic pain syndrome diagnosis of
2 Dr. Zepeda. In justifying his conclusion, the ALJ merely stated that
3 the diagnosis was "not supported by objective records." (AR 27).
4 The ALJ cannot, however, state in conclusory terms that a treating
5 physician's opinion is objectively unfounded. Instead, the ALJ must
6 cite to the record to support the assertion that the opinion of a
7 treating physician is not supported by objective medical evidence.
8 Reddick, 157 F.3d at 725. ("The ALJ must do more than offer his
9 conclusions. He must set forth his own interpretations and explain
10 why they, rather than the doctors, are correct."). By failing to
11 provide specific and legitimate reasons to reject Dr. Zepeda's
12 chronic pain syndrome, the ALJ has "prevented the parties and the
13 court from being able to analyze his reasoning." Vera v. Colvin,
14 No. 2:14-CV-2616-CKD, 2015 WL 7271750, at *6 (E.D. Cal. Nov. 18,
15 2015). Accordingly, the ALJ erred in rejecting Dr. Zepeda's chronic
16 pain syndrome diagnosis without providing further justification.

17
18 The ALJ also failed to give specific and legitimate reasons for
19 discounting Dr. Zepeda's canal lumbar stenosis diagnosis and related
20 functional limitations. The ALJ rejected Dr. Zepeda's diagnosis
21 because the 2012 MRI did "not mention canal stenosis at any level."
22 (AR 27). Yet the same MRI showed evidence of foraminal stenosis, a
23 similar form of spinal stenosis with similar symptoms and
24 limitations.³ (AR 554; Joint Stip. 12). Indeed, courts have not
25 made a meaningful distinction between canal and foraminal stenosis,

26 ³ The ALJ did not mention the presence of foraminal stenosis
27 in his explanation for rejecting Dr. Zepeda's diagnosis. (AR 27,
28 554).

1 instead opting for the term "spinal stenosis" to refer to canal
2 stenosis, foraminal stenosis, and spondylosis. See, e.g., Carmickle
3 v. Comm'r, Soc. Sec. Admin., 533 F.3d 1155, 1158 (9th Cir. 2008);
4 Iatridis v. Astrue, 501 F. Supp. 2d 1267, 1274 (C.D. Cal. 2007);
5 Lawson v. Massanari, 231 F. Supp. 2d 986, 990 n.4 (D. Or. 2001)
6 (citing Dorland's Illustrated Medical Dictionary 1404, 1564, 1576
7 (28th ed.1994) ("Spinal stenosis is narrowing of the spinal canal
8 caused by encroachment of bone into the space around the spinal
9 cord. Foraminal narrowing is stenosis specific to the
10 intervertebral opening. Lumbar spondylosis is a degenerative joint
11 disease affecting the vertebrae and intervertebral discs and can
12 cause stenosis and nerve root compression. Its symptoms are pain,
13 stiffness, and sciatic radiation.")). Similarly, Dr. Lin,
14 Plaintiff's orthopedic surgeon did not distinguish between the two
15 labels, diagnosing Plaintiff with "mild L4-5 stenosis." (AR 401).
16 Accordingly, the ALJ improperly correlated a narrowly labeled
17 diagnosis as objective evidence of no diagnosis.

18
19 The ALJ's conclusion would have been supported by the record,
20 if Plaintiff was asymptomatic or discontinued treatment. However,
21 Plaintiff continued treatment, with epidural injections and pain
22 medications; presented with a wide gait; and repeatedly showed signs
23 of pain upon palpation of the thoracic and lumbar facets, lumbar
24 intervertebral spaces, and bilateral sacroiliac joints, with
25 positive facet loading to "left>right;" and "palpable trigger points
26 in muscles of the low back." (AR 559, 562-62, 565, 641). Thus, the
27 ALJ erred in giving little weight to Dr. Zepeda's opinions on
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1 Plaintiff's limitation from lumbar canal stenosis in the RFC
2 determination.

3
4 Moreover, the opinion of Dr. Zepeda aligns with the diagnosis
5 and examinations done by Dr. Lin, Plaintiff's orthopedic surgeon.
6 The ALJ ignored Dr. Lin's conferring diagnosis and examinations,
7 despite their probative value. Godbey v. Apfel, 238 F.3d 803 (7th
8 Cir. 2000) (evidence that does not support the decision may not be
9 ignored, especially when the evidence is probative). During
10 examination, Plaintiff displayed abnormal lumbosacral spine flexion
11 and extension. (AR 415-16). Her condition did not improve past
12 Plaintiff's date last insured. In 2013, Dr. Lin reviewed x-rays
13 that showed moderate spondylosis, recommending removal of patient's
14 hardware to improve her pain. (AR 699). Dr. Lin's diagnosis should
15 be viewed as giving weight to Dr. Zepeda's opinion that Plaintiff
16 continued to suffer from lumbar spine limitations past Patient's
17 2012 MRI. See Lester, 81 F.3d at 832 (A similarity of conclusions
18 between doctors provides reason to credit the opinions of both
19 doctors as opposed to reject).

20 21 **B. Remand Is Warranted**

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23 The decision whether to remand for further proceedings or order
24 an immediate award of benefits is within the district court's
25 discretion. Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir.
26 2000). Where no useful purpose would be served by further
27 administrative proceedings, or where the record has been fully
28

1 developed, it is appropriate to exercise this discretion to direct
2 an immediate award of benefits. Id. at 1179 ("[T]he decision of
3 whether to remand for further proceedings turns upon the likely
4 utility of such proceedings."). Nonetheless, where the
5 circumstances of the case suggest that further administrative review
6 could remedy the Commissioner's errors, remand is appropriate.
7 McLeod v. Astrue, 640 F.3d 881, 888 (9th Cir. 2011); Harman, 211
8 F.3d at 1179-81.

9
10 Here, the Court remands because the ALJ failed to provide
11 specific and legitimate reasons to give little weight to Dr.
12 Zepeda's opinions on Plaintiff's functional limitations relating to
13 Plaintiff's chronic pain syndrome and canal lumbar stenosis
14 diagnoses. The record does not establish that the ALJ would
15 necessarily be required to find Plaintiff disabled if Dr. Zepeda's
16 opinions were properly considered in the RFC assessment. Remand is
17 therefore appropriate.⁴

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23 ⁴ In addition to the issues addressed in this order, the ALJ
24 should consider on remand any other issues raised by Plaintiff, if
25 necessary. "[E]valuation of the record as a whole creates serious
26 doubt that Plaintiff is in fact disabled." See Garrison v. Colvin,
27 759 F.3d 995, 1021 (2014). Accordingly, the Court declines to rule
28 on Plaintiff's claim that the ALJ erred in failing to find Plaintiff
not fully credible (see Joint Stip. at 22-26). Because this matter
is being remanded for further consideration, these issues should
also be considered on remand.

VI. CONCLUSION

For the foregoing reasons, the decision of the Administrative Law Judge is VACATED, and the matter is REMANDED, without benefits, for further proceedings pursuant to Sentence 4 of 42 U.S.C. § 405(g).

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: October 3, 2016

_____/s/_____
ALKA SAGAR
UNITED STATES MAGISTRATE JUDGE